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10/732,827	12/10/2003	Ann Marie Przepasniak	KCX-660 (19116)	6772
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/732,827	<b>Applicant(s)</b> PRZEPASNIAK ET AL.
	<b>Examiner</b> Ginger T. Chapman	<b>Art Unit</b> 3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

1) Responsive to communication(s) filed on 10 January 2008.

2a) This action is FINAL.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

4) Claim(s) 1-16 is/are pending in the application.

4a) Of the above claim(s) 4 and 7 is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-3,5,6 and 8-16 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on 10 December 2003 is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### **Priority under 35 U.S.C. § 119**

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### **Attachment(s)**

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 10/22/2007

4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_

5) Notice of Informal Patent Application

6) Other: \_\_\_\_\_

## **DETAILED ACTION**

### **Status of the claims:**

Claims 1-16 are pending in the application; claims 4 and 7 are withdrawn from consideration as being drawn to a nonelected invention.

### **Withdrawn objections:**

The objection to the use of the trademark MOCON in the Specification is withdrawn in view of Applicant's amendment filed January 10, 2008.

The examiner notes that nonelected claims 4 and 7 would require amending the term prior to any rejoinder of the claims. MPEP §§ 809.02(c), 809.02(e).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

1. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

1. Claims 1-3, 5-6 and 8-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zhao et al (US 6,514,602 B1) in view of Blaney et al (US 6,663,611 B2) in view of Bewick-Sonntag et al (US 6,232,521 B1) and further in view of Grenier (US 5,613,964).

2. With regard to claim 1, as seen in Figure 1, Zhao et al disclose an interlabial absorbent article (20) configured for disposition primarily within the vestibule (c. 13, l. 37) of a female wearer (fig. 5), comprising a generally liquid permeable, non-apertured cover sheet (42) comprising a first material (c. 14, ll. 52-53; see also c. 11, ll. 49-65, teaching preferred cover sheets are high loft nonwovens topsheets, while especially preferred being apertured formed film topsheets), a generally liquid impermeable back sheet (38) comprising a second material, said second material different than the first (c. 13, ll. 9-10), an absorbent material (44) disposed between the cover sheet (42) and back sheet (38).

3. With regard to the limitation of the back sheet having a water vapor transmission rate (WVTR) at least about 20% of the cover sheet WVTR, Zhao does not explicitly disclose ratios of WVT rates. Zhao, at c. 2, ll. 45-55, provides motivation for modifying the WVTR of materials used in absorbent article cover sheets and back sheets to provide flushable backsheets for interlabial articles that are comfortable for the wearer and not sticky during use, i.e. breathable, when used in hot and humid environments (c. 3, l. 30). Zhao, at c. 7, ll. 38-42 teaches backsheets having moisture vapor transmission rates (MVTR) of at least about 500 g/m<sup>2</sup>/24 hours to at least about 1000 g/m<sup>2</sup>/24 hours.

4. The examiner notes that WVTR and MVTR are expressed in the same units, i.e. g/m<sup>2</sup>/24 hours while Applicant has chosen to express WVTR in the non-conventional units of Mocon values, derived from the company that makes the particular test equipment used.

5. Blaney et al, at c. 3, ll. 10-25, teaches the ability of cover sheets and outer sheets to have different relative levels of breathability for wearer comfort, i.e. different vapor transmission rates, thus disclosing a desire for such. Blaney teaches an absorbent article (2) having a cover sheet (16) that has a water vapor transmission rate that is at least about 20% of a water vapor transmission rate of the back sheet (c. 7, ll. 15-35). In view of the teachings of Blaney, it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the back and cover sheets having the claimed ratio of WVTR since one of ordinary skill in the art would only have to reverse the configuration taught by Blaney to obtain the claimed limitation, and it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

6. Zhao discloses the claimed invention except for the limitation of the cover sheet and back sheet having a contact angle mismatch of less than about 25%. Zhao, at c. 12, ll. 25-26 and c. 19, l. 25, teaches the ability of the cover and back sheets to have different degrees of wettability, thus disclosing a desire for such. Bewick-Sonntag, at c. 1, ll. 25-40, expresses the desire to reduce leakage from breathable backsheets. As seen in Figures 3 and 4 (see also c. 7, ll. 25-45), Bewick-Sonntag teaches the use of materials having different contact angles in an absorbent article to create a hydrophobic gradient thereby reducing backsheet leakage. Bewick-Sonntag teaches a contact angle mismatch between the absorbent core and the backsheet instead of the cover sheet and the backsheet, and also teaches at c. 2, ll. 23-35 that the same gradient principles apply with the cover sheet and a breathable backsheet. Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the cover and

back sheets of Zhao having the claimed contact angle mismatch as taught by Bewick-Sonntag since Bewick-Sonntag states at c. 2, ll. 1-4 that the benefit of such a modification is that allows the use of a thin breathable backsheet that maintains the required level of protection.

7. With regard to the limitation of the article having an initial neutral buoyancy and sinks within about 7 days from being flushed, Zhao, at c. 1, ll. 50-60, expresses the desire for an interlabial pad that can be flushed down a toilet without clogging it or the sewage pipes. Grenier, at c. 10, ll. 35-45, teaches the ability of an absorbent article to be flushed down a toilet without clogging the plumbing by providing an article that is neutrally buoyant and remains substantially intact, thus disclosing a desire for such. Grenier teaches that if the article is neutrally buoyant and remains substantially intact, this enables it to be carried along with other waste in a moving stream of wastewater. Grenier further teaches at c. 10, ll. 50-55 that the materials and construction of a sanitary absorbent article can be selected to achieve an article which provides neutral buoyancy. As seen in Figure 1, Grenier teaches an absorbent article wherein upon being flushed, the article remains intact and has an initial neutral buoyancy. Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the article of Zhao having neutral buoyancy as taught by Grenier since Grenier states at c. 10, ll. 37 that the benefit of forming the article with this design is that it can be flushed without clogging the toilet, plumbing pipes, drain lines and sewers as it travels along the waste stream.

8. With regard to the limitation of the article sinks within about 7 days of being flushed, Grenier teaches the article remains neutrally buoyant and substantially intact as it is carried along with other waste from the toilet plumbing fixtures, through drain lines and sewers, therefore

examiner has reasonable basis to believe the article remains intact for the duration of its voyage along the waste stream, said voyage would reasonably take within 7 days. Additionally, 7 days fails to further limit the article, because it does not contain any other structural limitations of the device and floating time is not the limitation of the device; therefore Zhao/Grenier disclose the device substantially as claimed.

9. Moreover, when the article is flushed, one would not know when it sinks because the article has been removed from view of the flusher of the article, rendering it difficult for one of ordinary skill in the art to ascertain when this limitation would be infringed.

10. With regard to claims 2 and 3, Zhao teaches a cover sheet of rayon and film (c. 14, l. 50-60). Zhao discloses the claimed materials and the ability of the material to have a water vapor transmission rate of at least about 30,000 Mocon value is inherent in the material.

11. When the structure or the composition recited in the reference is substantially identical to that of the claims of the instant invention, claimed properties or functions are presumed to be inherent (MPEP § 2112-2112.01). A *prima facie* case of either anticipation or obviousness has been established when the reference discloses all the limitations of a claim, (in this case, a cover sheet of rayon and film) except for a property or function (in the present case a water vapor transmission rate of at least about 30,000 Mocon value) and the examiner reasonably believes that the reference inherently possesses properties that anticipate or render obvious the claimed invention and thus has a basis for shifting the burden of proof to applicant, as per *In re Fitzgerald*, 619 F.2d 67, 205 USPQ 594 (CCPA 1980).

12. As a practical matter, the Patent Office is not equipped to manufacture products by the myriad of processes put before it and then obtain prior art products and make physical comparisons therewith." *In re Brown*, 459 F.2d 531, 535, 173 USPQ 685, 688 (CCPA 1972).

13. The burden of proof has thus shifted to Applicants to come forward with evidence that the prior art would not exhibit the claimed WVTR Mocon values when tested according to the same procedures as Applicant's invention.

14. With regard to claim 5, Zhao teaches the back sheet comprises a highly breathable stretch thermal laminate (c. 7, ll. 20-45). With regard to the limitation of at least about 10,000 Mocon value, Zhao discloses the claimed materials and the ability of the material to have a water vapor transmission rate of at least about 30,000 Mocon value is inherent in the material.

15. The burden of proof has thus shifted to Applicants to come forward with evidence that the prior art would not exhibit the claimed WVTR Mocon values when tested according to the same procedures as Applicant's invention. See claims 2 and 3, *supra*.

16. With respect to the limitation of the WVTR (expressed as Mocon values), Applicant's specification contains no disclosure of either the critical nature of the claim limitations nor any unexpected results arising therefrom, and that as such the limitations were arbitrary and therefore obvious. Such unsupported limitations cannot be the basis for patentability, since where patentability is said to be based upon particular dimensions or another variable in the claim, the applicant must show that the chosen variables are critical. *In re Woodruff*, 919 F.2d 1575, 1578, 16 USPQ 2d 1934 (Fed. Cir. 1990). One having ordinary skill in the art would be able to determine the ideal water vapor transmission rates for a particular sheet.

17. With regard to claims 6 and 7, see claims 2 and 3 and 5, *supra*.

18. With regard to claims 8 and 9, Grenier teaches the absorbent material has wet and dry densities of at least about 1.0 g/cc (col. 11, ll. 66-67 to col. 12, ll. 1-35) in order to provide neutral buoyancy to the article. Grenier teaches that the density of water is 1.0 g/cc and thus material having about the same density of water, i.e. about 1.0 g/cc, would be neutrally buoyant in water (col. 12, l. 16).

19. Grenier teaches that flushability is determined by density, volume and bulkiness (c. 11, l. 66) which determines buoyancy in water and that density of the material improves performance when disposed of by flushing (col. 11, ll. 16-17), and further teaches optimizing these parameters to obtain desired flushability properties, i.e. neutral buoyancy (col. 11, l. 7) in the known process of selecting materials that are intended to be flushed (col. 12, ll. 15-35). Therefore density of the absorbent material is a result effective variable that can be varied to obtain varying buoyancy characteristics. In view of the teachings of Grenier, discovery of the optimum value of density in the process of obtaining an article that is neutrally buoyant in water as taught by Grenier for the flushable menstrual article of Zhao would have been obvious to one having ordinary skill in the art at the time the invention was made, since it has been held that discovery of optimum values of result effective variables in a known process involves only routine skill in the art. *In re Boesch and Slaney*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

20. With regard to claim 10, With regard to claim 10, Zhao discloses the cover sheet (42) is adhered to the back sheet (38) with an adhesive (col. 16, l. 21) around a circumference of the article (col. 16, l. 16).

21. With regard to claim 11, Zhao discloses the absorbent material comprises a cotton/rayon blend (col. 15, ll. 43-44).

22. With regard to claim 12, see claims 1, 2, 8 and 9, *supra*.
23. With regard to claim 13, see claim 1, *supra*.
24. With regard to claim 14, see claims 1, 8 and 9, *supra*.
25. With regard to claim 15, see claim 1, *supra*.
26. With regard to claim 16, see claim 1 *supra*.

***Response to Arguments***

27. Applicant's arguments filed January 10, 2007 have been fully considered but they are not persuasive.
28. Applicant argues the following:
29. I. Blaney describes an article having a cover sheet that has a water vapor transmission rate that is at least about 20% of the water vapor transmission rate of the backsheet, thus describing the opposite arrangement from the claimed invention.
30. II. It is improper to use Applicant's own Specification to provide the suggestion for modifying the prior art, the fact that the prior could be modified in the manner suggested by the Office action does not make the modification obvious unless the prior art suggests the desirability of the modification. It appears that the motivation for modifying Zhao in view of the teachings of Blaney results from using Applicant's disclosure to reconstruct the claimed invention out of the teachings of the prior art.
31. These arguments are not persuasive for the following reasons:
32. I. With respect to the reversal of the arrangement of the claimed invention, Blaney teaches the principle of choosing a WVTR ratio between the back sheet and the cover sheet,

therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to select materials having different WVTR ratios for the intended purposes since it has been held that mere reversal of the essential working parts of a device involves only routine skill in the art. *In re Einstein*, 8 USPQ 167.

33. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, both references are analogous art and seek to provide more comfortable, less "sticky" vapor and water permeable materials for use in absorbent articles (See Zhao at c. 2, ll. 51-54 and Blaney at c. 1, ll.30-37).

34. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

***Conclusion***

35. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ginger T. Chapman whose telephone number is (571)272-4934. The examiner can normally be reached on Monday through Friday 9:30 a.m. to 6:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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